NO. 16067

COURT OF APPEALS

for the Ninth Circuit

ULYSSES E. WILLIAMSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 10-31-58—40

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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Jurisdiction of the District Court is conferred by 18 USC § 3231. Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 37(a), Federal Rules of Criminal Procedure.

STATUTES INVOLVED

26 USC § 4705(a)—

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 USC 4704(a)—

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

21 USC § 174—

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954."

Rule 7(d)—Federal Rules of Criminal Procedure—

"*Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information."

STATEMENT OF THE CASE

The appellant was indicted in nine counts for violation of the federal narcotic laws. The first three counts of the indictment relate to a single sale and possession of heroin by appellant on September 21, 1957, Count I alleging appellant sold the heroin not in pursuance of a written order form, in violation of 26 USC § 4705(a), Count II alleging that appellant sold the same heroin not in or from an original stamped package, in violation of 26 USC § 4704(a) and Count III alleging that appellant received, concealed and facilitated the transportation and concealment of the same heroin which appellant knew had been illegally imported into the United States, in violation of 21 USC § 174. Counts IV, V and VI similarly charge the appellant with a second sale and possession of heroin on September 22, 1957. Counts VII, VIII and IX charge appellant with a third sale and possession of heroin on September 24, 1957.

The appellant was tried before a jury which found him guilty as charged in each of the nine counts of the indictment.

The government's evidence showed that on September 21, 1957 the appellant was introduced to Lavern E. Gooder, a federal narcotic agent, by an informant named George Williams, at Williams' apartment. After a short conversation, the appellant left George Williams' apartment and drove the narcotic agent to the appellant's residence. When inside the residence, the appellant asked the narcotic agent, "How much are you going to need to straighten you out?" and the narcotic agent replied that he would need "A spoon." (Tr. 17). Appellant went out of the room and returned with four capsules of heroin wrapped in cellophane paper, which he gave to the narcotic agent in exchange for fifty dollars in identifiable government funds (Tr. 18).

The narcotic agent testified that on September 22, 1957 he telephoned the appellant and asked, "Can you do anything for me?" The appellant responded that he could, and arranged to meet the agent in the men's room at the Greyhound Bus Depot in Portland, Oregon in half an hour (Tr. 29). At one-thirty p.m. on that day, the appellant came to the men's room in the Greyhound Bus Depot and placed a cellophane package containing four capsules of heroin in the coin-return slot in the pay telephone and received fifty dollars from the narcotic agent in identifiable government funds (Tr. 30, 31).

The same narcotic agent again called the appellant

by telephone on September 24, 1957 and asked appellant "if he could take care of me for three this time." The appellant indicated that he could and arranged to meet the agent in ten or fifteen minutes in the men's room at the Greyhound Bus Depot. The agent also asked the appellant, "what the tariff would be" and was advised by the appellant that it would be "a bill and a half," meaning one hundred and fifty dollars (Tr. 35). At approximately 11:25 a.m. on that day, the appellant came to the men's room in the Greyhound Bus Depot and deposited a cellophane package containing six capsules of heroin in the coin-return slot of the pay telephone. The appellant was arrested by the federal narcotic agent and the other officers at that time (Tr. 35, 37).

No written order form passed between the federal narcotic agent and the appellant in connection with any of these three transactions nor were there any revenue stamps on the cellophane wrapper or the capsules contained therein (Tr. 18, 21, 32, 37, 45). Each of the capsules was later determined by the government chemist to contain heroin hydrochloride (Tr. 4-6).

The government advance funds used by the federal narcotic agent in connection with the first two sales of heroin were later found in possession of the defendant in his clothing at his apartment and identified by serial number as being the same currency used in these sales (Tr. 77, 78).

Appellant testified that he had met the narcotic agent in a tavern and that the narcotic agent had represented to the appellant that he needed some "stuff" for

a girl that worked in a house of prostitution in Kelso, Washington, whom the agent was trying to take to the Oregon State Hospital for a narcotic cure. Appellant testified that he knew some people by the name of George Williams and Vicky Henderson who had taken the cure and might have some "stuff." Appellant further testified that he sent the agent out to George Williams and Vicky Henderson and that they refused to sell the "stuff" to him, but that they sold it to the appellant, who in turn sold it to the narcotic agent for the same price for which he purchased it on each of the three occasions.

Appellant was found guilty by the jury on all counts and was thereafter sentenced to imprisonment and to pay a fine. This appeal followed.

ARGUMENT

I. The Court properly refused to allow cross-examination of government witnesses as to collateral, irrelevant and immaterial matters.

The appellant claims that the court unduly restricted the cross-examination of the federal narcotic agents and the other government witnesses with respect to the reason the informer, George Williams, cooperated with the narcotic agents.

Narcotic Agent Gooder testified that he was introduced to the appellant by George Williams at Williams' apartment. Shortly thereafter the appellant took the narcotic agent to his own residence in another part of the city (Tr. 13, 14). The first sale of heroin took place

at the appellant's residence and the second and third sales occurred at the Greyhound Bus Depot. The record is clear that the informer, George Williams, was not present at the time of any of the three sales of heroin. His only function was to introduce the narcotic agent to the appellant.

On cross-examination of Narcotic Agent Gooder, appellant brought out that George Williams had "set up" the appellant by introducing him to the narcotic agent. Appellant then sought by cross-examination to show that the informer, George Williams, had been apprehended for violation of the narcotic laws and was apparently being granted immunity in exchange for his cooperation with the narcotic officers in introducing them to the appellant (Tr. 42, 43, 46-50).

The reason the informant, George Williams, was willing to cooperate with the narcotic officers is immaterial to any issue in the case. George Williams was not a witness. His credibility, motive or bias were not in issue.

In *Beasley v. U. S.*, D.C. Cir. 1954, 218 F.2d 366, the court upheld a similar restriction on cross-examination as to immaterial matters. The defense counsel had asked the narcotic agent as to who introduced him to the informant and as to how the narcotic agent knew the name of the informant. The court ruled that these questions were immaterial.

It is well-settled that the extent of cross-examination, particularly as to collateral matters, is peculiarly within the discretion of the trial court. *Dolan v. U. S.*, 8 Cir.

1955, 218 F.2d 454; *U. S. v. Manton,* 2 Cir. 1938, 107 F.2d 834.

In *U. S. v. Ginsburg,* 7 Cir. 1938, 96 F.2d 882, the exclusion on cross-examination of an informer dope addict of the question as to where he secured the narcotics that he had just taken, was sustained as being clearly within the court's discretion in limiting cross-examination.

In *Mims v. U. S.,* 9 Cir. 1958, 254 F.2d 654, this court recently held that the discretion of the trial court is large with respect to collateral evidence on cross-examination. Apparently the district court refused to allow appellant "to inquire into the business relationship" between appellant and the father of his alleged accomplice.

A. Court may require counsel to indicate materiality of proposed cross-examination and may exclude the same if it merely relates to collateral, irrelevant or immaterial matters.

It is equally clear that on cross-examination, the court may refuse to permit a question without an adequate statement from counsel indicating the relevancy thereof. *U. S. v. Easterday,* 2 Cir. 1932, 57 F.2d 165.

In the present case, the court inquired of counsel for appellant as to how the question could be relevant (Tr. 43, 48, 49) and received the response, "The purpose I have in mind is here we have a person who is admittedly guilty of a crime involved in the exact transaction which my defendant is in, and I am entitled to present that to the jury to see whether Williams instead of Williamson is not the guilty party."

Appellant's counsel also cited at that time, "U. S. v. Moses and U. S. v. Sawyer," in support of his contention, which cases appellant later admitted did not support his view (Tr. 64).

Appellant has now relied upon *Alford v. U. S.*, 1931, 282 U.S. 687, for the general rule that on cross-examination the examiner need not always indicate the purpose of his inquiry. The court's ruling in the present case was in an entirely different situation than found in the *Alford* case. In that case, the excluded question asked the witness was, "Where do you live?" In response to the court's inquiry as to the materiality of the question, counsel pointed out that he had information that the witness was in the custody of the government and defendant should be able to show this for the purpose of impeaching the credibility of the witness for bias or prejudice.

In the present case, the question excluded on cross-examination did not relate to the credibility, bias, prejudice or motive of the witness, but referred only to the collateral matter as to what motive or reason the informer had for cooperating with the narcotic agent.

The right of the trial judge to inquire as to the materiality of questions on cross-examination and the application of the *Alford* case to this situation has been carefully analyzed by Judge Learned Hand in *U. S. v. Easterday,* 2 Cir. 1932, 57 F.2d 165:

> "And even if it was obviously cross-examination, it was reasonable for the judge to ask why he wished the answer. True, as Alford v. U.S. makes plain, it is impossible for a cross-examiner to de-

> clare in advance what he can prove; he cannot tell till he has inquired. Yet it is fair to ask of him how the question can be relevant; what is the purpose of the inquiry. Cross-examination should not extend to aimless shots at random; a trial presupposes rational processes applied to the testimony uttered. The judge was not bound to allow what on its face had no bearing on the witness's credibility; the question was not inevitably and patently material. The situation thus was quite different from that in Alford v. U.S., where the defendant put as a ground that he had been told that the witness was in the custody of the prosecution."

Similarly, in *U. S. v. Remington,* 2 Cir. 1933, 64 F.2d 386, the trial court's refusal to allow defendant to inquire on cross-examination, in a prosecution for the crime of accepting a bribe, as to where the person who gave the bribe secured the money, was approved. The court held that it was not error to so limit cross-examination as to this immaterial matter, specifically pointing out that it did not think the rule in the *Alford* case "should be pushed so far."

B. Government is not required to produce a witness which it deems unnecessary to its case.

This court has often held that it is the prosecution's function to determine which witnesses it will select to establish the guilt of the accused. Process is available to appellant to call additional witnesses if he desires to do so:

> Ferrari v. U. S., 9 Cir. 1957, 244 F.2d 132.
> Love v. U. S., 9 Cir. 1935, 74 F.2d 988.
> Cummins v. U. S., 9 Cir. 1926, 15 F.2d 168.
> See also, U. S. v. Colletti, 2 Cir. 1957, 245 F.2d 781.

The *Ferrari* case, *supra,* is particularly applicable. It was also a narcotics case in which appellant contended the government should have produced a certain female special employee. The attorney for the defendant served a subpoena upon the head of the narcotics office at San Francisco, who informed the attorney that he had no idea of the whereabouts of the special employee and had no intention of finding her. This court held:

> "The appellee was under no obligation to look for appellant's witnesses, in the absence of a showing that such witnesses were made unavailable through the suggestion, procurement, or negligence of the appellee." (at p. 141)

In addition, this court cited with approval the following language from *Thomas v. U. S.,* D.C. Cir. 1946, 158 F.2d 97:

> " 'Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so.' " (at p. 142)

In the *Ferrari* case, the appellant also made the contention that the government failed to produce the witness as it feared that the testimony would corroborate the contentions of the appellant. In pointing out that such arguments might be permissible to a jury, this court held that they had no place in a brief in an appellate court, as it embodied pure speculation, quoting with approval the following from *Deaver v. U. S.,* D.C. Cir. 1946, 155 F.2d 740:

> "We know of no rule which holds it error for the government to fail to put on the stand a witness, not deemed necessary to its case, who might conceivably have given testimony favorable to the

defendant. It is for the defendant to make his own defense."

The record in this case shows that the defendant was arraigned on November 8, 1957 and the case tried on November 29, 1957. On November 14, 1957 the appellant placed in the hands of the U. S. Marshal a subpoena for George Williams. On November 18, 1957 the Marshal was advised by the Portland Police Department that George Williams was in Wyoming. At no time thereafter did appellant request that the U. S. Marshal make any effort whatever to serve the subpoena in Wyoming. At no time did appellant move that the government be required to produce the informer as a witness nor did the appellant move for a continuance of the case in order that the witness, George Williams, might be produced.

Appellant made no effort to locate or procure the attendance of George Williams as a witness during the ten days immediately preceding the trial after appellant had information of his general location in Wyoming. The government was not requested nor was it the government's duty to locate the witness for the defendant. In these circumstances no unfavorable inference against the government can be drawn from its failure to call this witness, who was equally available to either side. *Shurman v. U. S.*, 5 Cir. 1956, 233 F.2d 272.

The court's attention is also called to *U. S. v. Valdes*, 2 Cir. 1956, 229 F.2d 145, in which the court upheld the trial court's refusal to produce at the trial the informer who introduced the appellant to the narcotic

agent, because the likelihood that the witness, if produced, would have in any substantial way aided the defense, was extremely remote.

1. *Roviaro Case regarding Identity of Informer is Inapplicable.*

Appellant has cited, without discussion, the case of *Roviaro v. U. S.,* 1957, 353 U.S. 53, apparently in connection with the government's decision not to call the informer, George Williams, as a witness. Both the factual situation and legal issue in the *Roviaro* case are clearly distinguishable from the present case. In the *Roviaro* case, the sale of narcotics was made to an informant, whose identity the government refused to disclose.

In holding that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense, the court was careful to limit its ruling to the factual situation before it:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, *under these circumstances,* the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure." (at pp. 64, 65) (Emphasis supplied)

Certainly the record is clear in this case that appellant knew the identity of the informer, thereby relieving

the government of any duty to either disclose the name of the informer or otherwise produce him as a witness. *Sorrentino v. U. S.,* 9 Cir. 1947, 163 F.2d 627. The present case is more importantly distinguished, however, by the fact that the sale of narcotics was not made to the informer but to the federal narcotic agent who was called as a witness by the government. The informer was not present at the time of any of the three sales.

C. Appellant's contention that he was merely a "procuring agent" of the purchaser of the narcotics and therefore not guilty of sale of narcotics under the decision in "U.S. v. Sawyer," was resolved against appellant by jury's verdict under proper instructions.

Under its first assignment of error, appellant has cited *U. S. v. Sawyer,* 3 Cir. 1954, 210 F.2d 169, without discussion, but apparently in connection with appellant's claim that he was merely a messenger or a procuring agent for the purchaser of the narcotics and not a "seller" of narcotics or otherwise associated with the seller of narcotics. In the *Sawyer* case it was held to be error for the trial court to refuse to instruct the jury as to the difference between dealing with a purchaser as a "seller" and acting for the purchaser as a procuring agent, when the evidence as to the part played by the defendant in the transaction was conflicting. In the present case, the evidence as to the part played by the appellant in the transaction was also conflicting. The government's evidence showed that the appellant was introduced by an informant to a federal narcotic agent and the appellant thereafter, in the absence of

the informant, sold narcotics on three occasions to the federal narcotic agent. The appellant, however, testified to the effect that he was merely helping or assisting the purchaser as the purchaser's agent in securing narcotics from George Williams.

In view of this conflict in the evidence, the trial court, at the appellant's request, appropriately instructed the jury in accordance with the *Sawyer* case, that in the event the jury found that the appellant was not a dealer in or seller of narcotics but was only acting as an agent of the purchaser without any profit to himself, the appellant would not be guilty of selling or giving away narcotics as alleged in Counts I and II and the other similar counts in the indictment (Tr. 127). By its verdict finding the defendant guilty on all counts, the jury resolved this issue against the appellant.

The so-called "procuring agent theory," as set forth in the *Sawyer* case, however, does not apply to Counts III, VI and IX of the indictment. Due to the election made by the government at appellant's request prior to trial, these counts do not allege a *"sale"* of narcotics but merely the receiving, concealing and facilitating the transportation and concealment of the narcotics, in violation of 21 USC § 174.

This court has recently observed in *Bruno v. U. S.*, 9 Cir. 9/15/58, 15992, that in all of the cases concerning the "procuring agent theory," the government had relied solely on the "sale" portion of 21 USC § 174 and had not relied upon the "facilitating the transporation or sale" portion of 21 USC § 174.

It is therefore abundantly clear in the present case that the jury has resolved the procuring agent theory against the appellant and has found the appellant guilty of sale, in the counts alleging a sale under 26 USC §§ 4704(a) and 4705(a). It is equally clear that the procuring agent theory has no application to the counts which do not allege sale but merely the "facilitating the transportation" portion of 21 USC § 174.

In *U. S. v. Valdes,* 2 Cir. 1956, 229 F.2d 145, the defendant similarly attempted to assert the procuring agent theory in a case, like the present, in which the defendant had been introduced to the narcotics agent by an informant. Justice Medina summarily disposed of appellant's contention as follows:

> "Appellant's reliance on the theory that defendant was merely a 'procuring agent' is misplaced, as it was the testimony of Miss Thomas [policewoman] that she met defendant for the purpose of purchasing a quantity of heroin from him and that she did so. We have no occasion to take any position with reference to the holdings by our brethren of the Third and Fifth Circuits in United States v. Sawyer, 1954, 210 F.2d 169 and Adams v. United States, 1955, 220 F.2d 297, where the facts bear little resemblance to those before us here." (at p. 148)

D. No claim of entrapment was made by appellant at the trial.

Appellant has cited *Sherman v. U. S.,* 1958, 356 U.S. 369, in which the Supreme Court of the United States recently found entrapment as a matter of law in a factual situation entirely different than this case.

At the trial, the appellant did not claim entrapment. When asked specifically by the court as to whether appellant was claiming entrapment, counsel for appellant responded:

> "At the moment, your Honor, I do not have enough evidence in my possession to make such a claim, but I would like to develop this phase as to how—here we have a guilty man who has sold and has not been prosecuted involved in this capture." (Tr. 48)

Appellant neither requested any instructions on the subject of entrapment nor took exception to the fact that the court did not submit the issue to the jury. Since the appellant did not assert the defense of entrapment, the government was precluded from rebutting such defense by showing the appellant's willingness and predisposition to sell narcotics. It is therefore clear that the defense of entrapment, not having been asserted at the trial, should not be made an issue for the first time on appeal. *U. S. v. Ginsburg,* 7 Cir. 1938, 96 F.2d 882.

The facts in the present case are somewhat similar to *Gonzales v. U. S.,* 9 Cir. 1958, 251 F.2d 298, in which an informant introduced the narcotic agents to the appellant and, as in the present case, the appellant thereafter, in the absence of the informant, made more than one sale of narcotics to the government agent. On these facts, this court held that there was nothing in the record to warrant the defense of entrapment, particularly in view of repeated sales, citing *Trice v. U. S.,* 9 Cir. 1954, 211 F.2d 513.

II. Court did not err in excluding portion of testimony of Dr. Norman K. David.

A mere reading of the testimony of the expert pharmacologist produced by the defense will demonstrate that the general discussion of the nature and effect of narcotics was not material to any issue in the case.

The government finally objected to a question as to whether the pharmacologist was able to detect a narcotic addict when the addict was under the influence of drugs. The fact that an addict, while under the influence of drugs, may appear normal, would hardly be relevant. More pertinent would be the question as to whether the appellant knew, because of his knowledge or experience, that narcotic users appeared normal even when using narcotics, which question, of course, could not be answered by the pharmacologist.

A. Appellant's claim that the pharmacologist's testimony showed that heroin could be "easily" made from morphine is untenable.

The process for manufacturing heroin from morphine was described in detail by the pharmacologist (Tr. 115, 116). Although appellant's counsel attempted to make it appear that heroin could be manufactured by simply adding warm vinegar to morphine, the pharmacologist was careful to point out that the process could be done "with any chemical laboratory with some simple facilities and the chemicals" (Tr. 115). Appellant's claim that the morphine could be obtained from the Oregon State Hospital was also precluded by the pharmacologist's testimony. This witness testified that

barbiturates and other depressant drugs were being used for the cure of drug addiction but did not testify that morphine was being used for this purpose (Tr. 114, 115). It follows that the purported defense that the heroin sold in this case was "easily manufactured from morphine" secured from the Oregon State Hospital is pure sham and fabrication.

B. Appellant's claim of possible defense under the Exempt Preparations Provision is frivolous.

The Exempt Preparations Provision of 26 USC § 4702(a) provides in part:

> "(a) *Preparations of limited narcotic content*— The provisions of this subpart and sections 4721 to 4726, inclusive, shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing or possession of preparations and remedies which do not contain . . . more than one-eighth of a grain of heroin, . . . in 1 avoirdupois ounce; . . .
>
> "PROVIDED, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subpart of sections 4721 to 4726, inclusive, PROVIDED FURTHER, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section, lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary or his delegate shall direct . . . and every such person so possessing or disposing of such preparations and remedies shall register as required in section 4722 and, if he is not paying a tax under section 4721, he shall pay a special tax of $1 for each year, or

> fractional part thereof, in which he is engaged in such occupation, to the official in charge of the collection district in which he carries on such occupation as provided in sections 4721 to 4726, inclusive."

The heroin sold in this case was not an exempt preparation of limited narcotic content. To so qualify it would have to contain not more than one-eighth of a grain of heroin in each ounce. The government chemist testified that the narcotics were approximately 7% heroin. This testimony was uncontested and no effort whatever was made to have the appellant's pharmacologist test the drugs.

Since there are 437 grains in one ounce, a 7% mixture of heroin weighing one ounce would contain 30.59 grains of heroin. It follows that the narcotics in this case contained over 244 times as much heroin as would be allowed by the Exempt Preparations Provision.

During the testimony of the appellant no attempt was made to show (a) that he kept records; or (b) was registered; or (c) paid the tax as required by 26 USC 4702(a), in order to further comply with the law with respect to exempt preparations of limited narcotic content. The excluded portion of the pharmacologist's testimony could not possibly have filled these gaps. The claim of a possible defense under this provision appears frivolous.

III. The instructions in their entirety fully and correctly presented the law in the case to the jury.

The court, when discussing with appellant's counsel the materiality of the testimony of a defense witness, commented that, "The question in this case is did this man sell narcotic drugs to somebody. That is the issue." (Tr. 118).

Appellant erroneously characterizes the statement by the court as an "instruction." Actually it was a mere explanation by the court to counsel for the appellant as to why the proposed testimony of the defense witness was immaterial as it did not relate to the question whether or not the appellant had transferred or sold any narcotics. It was clearly not an instruction directed to the attention of the jury.

Even if this were to be considered an instruction, the court's charge in its entirety fully and adequately stated the law for the jury. This court has many times held that if the instructions considered as a whole are free from error and fully advise the jury of the law of the case an assignment of error predicated upon an isolated sentence will be disregarded. This is particularly true when the detached statement did not mislead the jury and the instructions considered as a whole properly submitted the case to the jury.

Herzog v. U.S., 9 Cir. 1956, 235 F.2d 664.
Stein v. U.S., 9 Cir. 1948, 166 F.2d 851.
Nicholson v. U.S., 8 Cir. 1955, 221 F.2d 281.
Hargreaves v. U.S., 9 Cir. 1935, 75 F.2d 68.

Herzog v. U.S., supra, was an income tax evasion case in which the trial court gave in its instruction an

erroneous definition of the term "willfullness." The rule followed in this situation is plainly stated by the Court:

> "In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record."

More specifically, in *Stein v. U.S., supra,* the appellant also objected to a particular instruction isolated from the charge as given by the court. Judge Orr clearly stated the view of this court as follows:

> "Some of the objections appear to be extremely technical and *other objections are directed to a particular instruction isolated from the charge as given by the Court.* We think the proper approach is to view the charge as a whole to determine whether or not the jury was properly and adequately instructed as to the law governing the case. We have followed that procedure here and careful consideration of the entire charge convinces us that the instructions given constituted a full, complete and adequate presentation of the law of the case to the jury." (Emphasis supplied.)

Detached phrases and sentences are not singled out and considered alone but construed in connection with the entire charge to the jury. In *Nicholson v. U.S., supra,* the defendant was charged with conspiracy to unlawfully "transfer marihuana." In instructing the jury the court inadvertently on one occasion referred to an agreement "to sell marihuana." The appellant contended that this discrepancy in terminology was error. The court held that this was not reversible error since there could not have been any prejudice to the defendant

since the instructions, when considered as a whole, clearly defined and explained the charge beyond any possibility of misunderstanding. The government submits that in the present situation the instructions of the court fully and adequately explained the charge to the jury.

The only case cited by appellant in support of his position is *Nicola v. U.S.,* 3 Cir 1934, 72 F.2d 780, which bears little similarity to the present situation. In the *Nicola* case the court, during its regular instructions in an income tax evasion case gave an erroneous instruction as to the time when it would be considered that the defendant received certain income. The jury returned on two separate occasions to be reinstructed on the same subject. The Court of Appeals held that the instructions given on each of these occasions were erroneous, and even if one of them were correct, the court did not indicate to the jury which one was correct and did not withdraw any of the former instructions.

In the present case, however, the statement of which appellant complains was not addressed to the jury at all but was a statement to counsel explaining the reasons of the court for not admitting certain testimony. The statement made by the court was a correct statement of the law as far as the court went, indicating this case concerns the sale of narcotics without further stating all of the details with respect to order forms and stamped packages and the other technical requirements which were fully explained to the jury during the course of the court's instructions.

IV. Appellant's motion for acquittal was properly denied as there was substantial evidence to sustain the verdict of the jury.

A. Verdict of jury was based on substantial direct evidence and should not be set aside on review.

In each of the following cases this court on review has held that the verdict should not be set aside unless the court can say as a matter of law that the evidence is not sufficient to support it.

Blassingame v. U.S., 9 Cir. 1958, 254 F.2d 309.
Schino v. U.S., 9 Cir. 1953, 209 F.2d 67.
Stoppelli v. U.S., 9 Cir. 1950, 183 F.2d 391.
Davenport v. U.S., 9 Cir. 10/22/58, 15689.

In the *Blassingame* case the rule has been successfully stated as follows:

> "Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L.Ed. 680, provides a standard for reviewing the sufficiency of evidence in a criminal prosecution:
>
> > 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' "

Most of the contentions made by appellant with respect to his motion for acquittal are based on the testimony of the appellant. A similar claim was made in the *Davenport* case, where the appellant also contended in her extensive testimony before the jury that she was innocent of any wrongdoing. This court pointed out, however, that these matters are for the jury to determine from all of the evidence in the case:

"It was for the jury to determine where the truth lay. They are not required to believe the appellant."

The evidence in the case clearly demonstrates that a narcotic agent was introduced to the appellant by an informer and that thereafter the appellant, in the absence of the informant, sold heroin to the narcotic agent on three separate occasions. The jury was adequately and fully instructed as to the appellant's contention that he was a mere procuring agent or messenger for the narcotic agent. The jury, by its verdict of guilty, resolved this, and all of the other issues of fact, against the appellant.

B. Claim of entrapment as a matter of law made for first time on appeal is not supported by the record.

The subject of entrapment has been more fully discussed under Argument I-D in connection with our response to appellant's first assignment of error. At no time during the trial did appellant claim entrapment. No instructions were requested on the subject and no exceptions were taken because entrapment was not covered by the court's instruction. In neither the motion for acquittal at the close of the government's case nor the similar motion at the end of the case, did appellant claim that he should be acquitted on the ground of entrapment. The only theory advanced to the court was that the appellant was a mere procuring agent or messenger of the narcotic agent. Appellant's requested instruction in this regard was given and the issue of fact resolved against appellant by the verdict of the jury.

C. There is not any unfavorable inference against the government for not calling a witness accessible to both parties.

The subject of the absent witness was more fully discussed in this brief under Argument I-B in connection with the government's response to appellant's first assignment of error.

The facts in *Wesson v. U.S.,* 8 Cir. 1949, 172 F.2d 931, relied upon by appellant in connection with the absent witness are clearly distinguishable. In the *Wesson* case, the absent witness was a patient for whom the defendant physician had prescribed narcotics. During the course of the trial it developed that the prescription had been altered. The testimony of the absent witness with respect to the manner in which the prescription was changed became a matter peculiarly and uniquely within the knowledge of the absent witness. In the present case, however, all of the facts relating to the three transactions involved occurred within the personal observation of the witnesses produced by the government. The *Wesson* case has been distinguished on this ground in *U.S. v. Lessaris,* 7 Cir. 1955, 221 F.2d 211, which was also a case where the government elected not to call the informer as a witness.

As we have pointed out earlier, this court in *Ferrari v.U.S.,* 9 Cir. 1957, 244 F.2d 132, has made it plain that the contention that the government's failure to produce a witness because it feared that the testimony would corroborate the appellant's defense might be a permissible argument to a jury, but has no place in a brief in an appellate court, as such contention embodies pure speculation.

D. Evidence demonstrates appellant not within the "Surrender of Heroin" provisions of Narcotic Control Act of 1956.

Apparently it is appellant's contention that the surrender of heroin provision of the Narcotic Control Act of 1956 (18 USC 1402) provides an exception to 26 USC 4705(a) whereby any future sale of narcotics to a federal narcotic agent will not be subject to prosecution. The fallacy of this theory is readily seen by a mere reading of the statute:

> 18 U.S.C. § 1402. *"Surrender of Heroin—procedure.* Any heroin lawfully possessed prior to the effective date of this Act shall be surrendered to the Secretary of the Treasury, or his designated representative, within one hundred and twenty days after the effective date of the Act, and each person making such surrender shall be fairly and justly compensated therefor. The Secretary of the Treasury, or his designated representative, shall formulate regulations for such procedure. All quantities of heroin not surrendered in accordance with this section and the regulations promulgated thereunder by the Secretary of the Treasury, or his designated representative, shall by him be declared contraband, seized, and forfeited to the United States without compensation."

Since this law became effective July 18, 1956, any person *lawfully possessing* heroin prior to July 18, 1956, was required to surrender the same to the Treasury Department prior to November 19, 1956. The Act does not provide for any surrender or sale to narcotic agents after that date.

It is obvious in this case that all three sales of narcotics occurred at least a year later, in September of 1957, and therefore were not within the surrender

provisions of the statute. It is equally clear that heroin could not be "lawfully possessed" subsequent to November 19, 1956. It follows that appellant's argument with respect to this provision of the Narcotic Control Act of 1956, which was enacted to provide for a more effective control of narcotic drugs, is wholly without merit.

V. The striking of surplusage from the indictment on the motion of the appellant was authorized by Rule 7(d) of the Federal Rules of Criminal Procedure.

A. The striking of surplusage from the indictment was clearly on the motion and with the consent of appellant.

Pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure some of the counts in the indictment allege that the defendant committed the offense by more than one specified means. Pursuant to the appellant's motion the government was required to file an election as to upon which of the several means or ways alleged in the indictment the government intended to rely (Tr. Vol. I, page 8). Some of the means by which the indictment alleged the defendant committed the offense were therefore eliminated from the case and from the jury's consideration. For example with respect to Counts II, V and VII the indictment alleges "purchase, sell, dispense and distribute." In its notice of election the government indicated that it intended to rely only upon the specified means of "sell, dispense and distribute" and not upon the allegation of "purchase".

As the case was about to be sent to the jury the court inquired as to whether the eliminated words

should be obliterated from the indictment (Tr. 137). At that point the Assistant United States Attorney suggested that the notice of election (Tr. Vol. I, page 8) be sent to the jury with the indictment. The court then inquired of appellant's counsel as to whether the notice of election should be sent to the jury or should the surplus wording be stricken out to which counsel for appellant responded "it might be better to strike" (Tr. 138).

It is therefore abundantly clear that the surplus words were stricken from the indictment upon the motion and with the consent of the appellant.

Rule 7(d) is apparently based on the theory that if a defendant has power to waive an indictment altogether he certainly has the power to consent to the striking out of surplusage. The note to subdivision (d), Notes of Advisory Committee on Rules, states as follows:

> "This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in light of the rule that the guarantee of indictment by a grand jury implies that an indictment may not be amended. Ex parte Bain, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849. By making such a motion, the defendant would, however, waive his rights in this respect."

B. Authorities relied upon by appellant are clearly distinguishable.

Appellant's reliance upon *Ex parte Bain,* 1886, 121 U.S. 1, is misplaced. Not only was the motion to strike certain words from the indictment made by the government in the *Bain* case but the words eliminated from the indictment related to a material ingredient of the crime charged. In the *Bain* case the defendant was charged with making a false report to the Comptroller of the Currency in violation of the banking laws. At the time of trial the *government* moved to strike out the words "the Comptroller of the Currency and" from the indictment. Since the indictment originally alleged that the defendant filed a false statement and report with intent to deceive "the Comptroller of the Currency and" other agents of the government it was certainly changing a material and essential part of the indictment to eliminate these words.

In this case, however, the motion to strike out the surplusage was made by and with the consent of the appellant. In addition the words stricken out were clearly surplusage. As we have noted the indictment alleged more than one specified means by which the offense was committed which procedure is proper under Rule 7(c) of the Federal Rules of Criminal Procedure. Due to the election which the government was required to make pursuant to the motion of the appellant some of the specified means by which the crime was alleged to have been committed were eliminated from the indictment. The Court's action was therefore simply the deletion from the indictment of an allegation which had

become unnecessary and impertinent due to the election which the government was required to make. This procedure is entirely consistent with the principle that it is proper to charge in the conjunctive the various allegations in the indictment where the statute specifies several means or ways in which an offense may be committed in the alternative. *Smith v. U. S.*, 5 Cir. 1956, 234 F.2d 385, 389.

Likewise *Carney v. U. S.*, 9 Cir. 1947, 163 F.2d 784 is distinguishable. Defendant had been charged with forging and counterfeiting "K-14H Gasoline Ration Coupons". Actually there never were any "K-14H Gasoline Ration Coupons" but there were "A-14H Coupons". The substitution of the words "A-14H" for "K-14H" was held to be fatal as it changed a material part of the indictment. In so ruling this court was careful to point out that the situation before it was more serious than the mere striking out of surplusage from an indictment. As we have demonstrated, however, the words stricken from the indictment in the present case were surplusage as they merely indicated the alternative means by which the crime may have been committed which were eliminated from the case by the government's election required by the motion of the appellant. Clearly if the court had changed the name of the narcotic which the appellant is alleged to have sold and possessed an entirely different situation would confront the court.

In *U. S. v. Krepper*, 3 Cir. 1946, 159 F.2d 958, 970, a similar deletion of words eliminating one of

the specified means by which a defendant committed the crime was held not to be an amendment to the indictment but a mere striking of surplusage. The court pointed out that an indictment is amended only when it is so altered to charge a different offense than that found by the grand jury, citing *Ex parte Bain,* supra. It is certainly not error to remove from the jury's consideration one of the specified means by which it is alleged that the defendant committed the crime:

> "[18] It is also a settled proposition of law that when an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. *Goto v. Lane,* 265 U.S. 393, 403, 44 S.Ct. 525, 68 L.Ed. 1070; *Ford v. United States,* 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793.
>
> "In view of the motion made by counsel for the Government, the purpose of which was not to alter or change the indictment but to show that the parties construed and understood the acts or accusations in a particular way, and in view of the fact that each Count of the Indictment charged the commission of the offense in two different ways, it would appear to be a far fetched strain of imagination to hold that the substance of the Indictment had been altered, modified or changed."

C. Appellant's contention regarding "amendment of the indictment" has no application to Counts I, IV and VII as no words were stricken from these counts.

As the government was not required to make any election as to the various specified means by which the appellant is alleged to have committed the crime alleged in Counts I, IV and VII there were no words stricken

as surplusage from these counts. The sentence received by appellant was less than the maximum allowed by law for any one count of the indictment and the sentence was allowed to run concurrently. It is well settled that the sustaining of appellant's conviction on any one of the counts of the indictment requires affirmance of the judgment below when the general sentence imposed on all counts was less than the maximum allowable on any single count. *Abrams et al. v. U. S.*, 1919, 250 U.S. 616; *Carney v. U. S.*, 9 Cir. 1947, 163 F.2d 784.

CONCLUSION

The verdict of the jury finding the appellant guilty on all counts is fully sustained by the evidence and the judgment should be affirmed.

Cross-examination by appellant was not unduly limited, as the court merely excluded irrelevant and immaterial testimony as to the reason the informer, who was not a witness, was willing to cooperate with the government.

The government produced all witnesses it deemed necessary to prove its case. The appellant had ample opportunity to request the presence of the absent witness if his testimony was desired for the defense.

At no time during the trial did appellant claim entrapment, request instructions on this defense or move for acquittal on this ground. The appellant did claim that he was merely a procuring agent of the purchaser of the narcotics and the jury was adequately instructed on this theory of defense.

The jury was fully and adequately instructed as to the law applicable to the case. The verdict of the jury resolved the issues of fact against the defendant. The jury apparently did not believe the appellant's testimony.

The other defenses submitted by the appellant, such as the Exempt Preparations Provision, the Surrender of Heroin Provision and the theory that heroin can be easily manufactured from morphine, have no basis in fact or law.

The striking of surplusage from the indictment was based on the motion of and with the consent of the appellant and was authorized by Rule 7(d) of the Federal Rules of Criminal Procedure.

It is respectfully submitted, therefore, that the conviction of the appellant is fully supported by the record and should be affirmed.

Respectfully submitted,

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